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IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 727

KATHERINE SHELLHAMMER, General Administratrix of the Estate of WALTER R. SHELLHAMMER, deceased,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Appellate Division of the Superior Court of New Jersey (P142a *et seq.*) has not been officially reported. The opinion of the New Jersey Supreme Court granting Certification is reported at 13 N. J. 291 and its opinion affirming the Appellate Division, is reported at 14 N. J. 341.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under Title 28 U. S. C. Section 1254 (Pb1). This Sec-

tion relates solely to the review of judgments of the Courts of Appeals. This Court does have jurisdiction, however, under Title 28 U. S. C. Section 1257 (3) and Rule 38, par. 5 (a) if a state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. Respondent assumes this is the basis of the jurisdiction that petitioner in fact, relies upon.

Question Presented

This action was brought under the Federal Employers' Liability Act (U. S. C. Title 45, Sections 51 *et seq.*) in the Superior Court of New Jersey (P1a). It was tried October 21st to 28th, 1952 and at the conclusion of the evidence, the trial Court granted a motion for judgment in favor of the respondent (P8a). Petitioner appealed to the Appellate Division of the Superior Court (P9a) and urged a reversal of the judgment on two grounds. The first ground was for alleged error in not submitting the case to the jury and the second ground was for various alleged errors in the exclusion of certain testimony (P145a-10 to 20; P149a-5 to 20). The Appellate Division, by a unanimous decision, affirmed the action of the trial Court in all respects. The petitioner then applied to the New Jersey Supreme Court for leave to review the Appellate Division's holding that the trial judge did not err in not submitting the case to the jury. The Supreme Court of New Jersey granted petitioner the right of review. The sole question urged before, considered by or decided by the New Jersey Supreme Court, was whether the courts below had correctly held that the petitioner had failed to prove that a negligent failure of duty on the part of the respondent was the proximate cause of the fatality (Appendix to Petitioner's br. p. 26).

The sole question presented on this application is whether this Court will grant its discretionary writ to bring the record here for a third judicial examination of the proof in

order to determine whether there was any evidence established which warranted the question of liability being submitted to the jury.

Statement of the Case

The plaintiff's intestate, hereinafter referred to as "Shellhammer" was an employee of the defendant railroad. It was stipulated that the Federal Employer's Liability Act applied to the case and that Shellhammer's death on January 13, 1951, was due to decapitation (P11a-1). The plaintiff, who had called all the witnesses known to have any knowledge of the occurrence, established the following facts.

The occurrence took place in a freight yard located in Jersey City, New Jersey, that was owned and operated by the defendant. The easterly end of this yard abutted on the Hudson River. At this point there were float bridges used as a means in loading and unloading freight cars on and off car floats. Johnston Avenue bounded the yard on the southerly side. The Morris Canal Basin was the northerly boundary. At a point west of the Hudson River, Washington Street, which was a dirt roadway, extended from Johnston Avenue across the tracks of the defendant's yard to the Morris Canal Basin. This yard was used as a place to group, according to destination, the various freight cars arriving from the car floats. It contained a number of tracks but the particular tracks referred to by the witnesses, all ran east and west and starting from the southerly side were called "Lower East Bound", "Lower West Bound", "1 Dock", "2 Dock", "3 Dock" and "4 Dock".

During the course of the day of January 13, 1951, several yard engines, with their respective crews, assembled three groups of cars totaling forty-eight cars in all. There were fourteen cars on Track 1 Dock east of Washington Street. There were six cars on Track 3 Dock west of Washington

Street and twenty-eight cars on Track 3 Dock east of Washington Street (D15a-10). There were no cars on the other tracks mentioned above (D29a-30).

The cars in each of the three groups had been coupled together and the air hoses connected. The train crews had done the coupling of the cars and two car inspectors, "Gumhold" and "Helmstetter" had connected the air hoses (D42a-15). Gumhold and Helmstetter were the subordinates of Shellhammer who was employed by the defendant as foreman of car inspectors and repairers (D16a-30). The three groups of cars were to be assembled into a single train, designated as "JS1 & JB1" and taken to Oak Island which is located about eleven miles west of the yard in Jersey City.

The engine and crew which was to assemble the three groups of cars into a single train was designated as a "pullout" (D6a-30). The crew consisted of Luther H. Schumacher, the foreman or conductor, James P. O'Donnell, a trainman, Gerald O'Hara, a trainman, John P. Hann, the engineer and a fireman.

Shellhammer had arrived at the office of yardmaster, Joseph F. Smith at about 7:30 P.M. (P17a-20). This office was located about 300 feet north of the tracks in question and west of Washington Street (P13a-10). Shellhammer's duties were solely of a supervisory nature. He performed no actual labor himself but directed his subordinates, the car inspectors and car repairers, as to whatever work should be done. His presence in this yard was to see that train "JS1 & JB1" left the yard on time (D16a-30).

About 8:00 P.M. on the night in question, the "pullout", which then consisted of a diesel engine headed east with a caboose attached to its rear or west end, moved easterly along Track 1 Dock and stopped with its front end at the west side of Washington Street (D32a-25). Conductor Schumacher and trainmen, O'Donnell and O'Hara, alighted

from the caboose. Schumacher walked in a northerly direction to the yardmaster's office (D7a-20). O'Donnell walked across Washington Street and continued easterly along the south side of the fourteen cars that were standing east of Washington Street on Track 1 Dock (D32a-30). He then crossed over Tracks 1 Dock and 2 Dock and proceeded to walk along the southerly side of the twenty-eight cars that were standing on Track 3 Dock (D32a-35). He placed a red lantern on the most easterly of these cars as this would be the rear end of the train when it left the yard (D32a-40). Trainman O'Hara walked across Washington Street to the westerly end of the fourteen cars on Track 1 Dock and assisted in making the coupling of these cars to the engine (D7a-30). The caboose, engine and the fourteen cars then moved west until the easterly end of the fourteen cars passed beyond a switch which would permit the train to be backed easterly into Track 3 Dock (D8a-10). During this movement, trainman O'Hara rode on the train so as to be the nearest man to engineer Hann and be able to relay signals to him (D39a-20). Conductor Schumacher who in the meantime had returned from the yardmaster's office, took a position near the switch for Track 3 Dock. The caboose, engine and fourteen cars then moved east from Track 1 Dock into Track 3 Dock. When the six cars standing on Track 3 Dock west of Washington Street were reached, they were coupled to the east end of the fourteen cars (D9a-10). The caboose, engine and twenty cars then continued easterly on Track 3 Dock in order to couple on to the twenty-eight cars standing on that track east of Washington Street (D9a-15). The westerly end of these cars was about three feet from the easterly edge of Washington Street (D10a-15). Trainman O'Donnell who by this time had completed his inspection of the twenty-eight cars standing on Track 3 Dock, had returned to Washington Street prepared to make the final coupling (D34a-1).

About the time the train movements described above were completed, Shellhammer and his car inspectors, Gum-

hold and Helmstetter, were on Washington Street (D16a-35). Shellhammer and Gumhold were on the south side and Helmstetter on the north side of Track 3 Dock (D17a-10). The caboose, engine and twenty cars were moved easterly and trainman O'Donnell coupled them to the twenty-eight cars standing east of Washington Street (D34a-1). Then Gumhold, on the south side and Helmstetter on the north side at the point where this last coupling had been made, connected the air hoses and opened the air valves. At this time Shellhammer was standing in back of Gumhold (D17a-10).

It was necessary to make a practical or operating test of the air brakes before the train departed (D19a-35). In order to relay the necessary signals for this test, trainman O'Hara had taken a position on the ground seven or eight cars east of the engine (D40a-10). Conductor Schumacher took a position east of O'Hara (D40a-5) and trainman O'Donnell took a position about four or five cars west of Washington Street (D11a-20). They were all on the south side of the train as was Gumhold and Shellhammer. Gumhold, by signal given with his lamp, requested that the air brakes be applied by the engineer (D17a-28). This signal was relayed by the trainman to the engineer and he applied the air brakes (D40a-15). Gumhold then gave the necessary signal by lamp to have the engineer release the air brakes and this signal, in turn, was conveyed to the engineer who released the air brakes (D18a-15). Gumhold observing that the air brakes had worked properly on the test, hollered out to trainman O'Donnell, who was a number of cars west of him, "Jimmy, the train is all yours" (D18a-20). Shellhammer who was standing in back of him then said to Gumhold "Good night, I will see you next week" (D18a-25). Gumhold then proceeded to cross over the cars from the south to the north side (D18a-30). Helmstetter who was on the north side left as soon as the train started in motion (D44a-30). O'Donnell walked westerly to the point where he met conductor Schumacher and they

then both walked westerly toward the caboose (D36a-15). When they reached the engine which they had to pass to get to the caboose, conductor Schumacher said to engineer Hann, "We're ready to go whenever you're ready" (D36a-30). Schumacher and O'Donnell then entered the caboose. O'Hara had already entered the caboose. Due to the fact that in the making of the air brake test some of the reserve of air on the engine had been depleted, it was necessary for engineer Hann to wait a few minutes until the air reserve had been replenished (D46a-40). When this reserve had been replenished, he blew his engine whistle indicating that he was ready to move (D48a-5) and thereupon conductor Schumacher told O'Hara to give the engineer the signal to start. O'Hara went to the rear end of the caboose and gave a hand signal to the engineer to move (D40a-25). Engineer Hann then started his engine bell ringing (D48a-15) and proceeded to move westerly out of the yard.

Shortly after the train "JS1 & JB1" had departed, an engine and crew that had been working west of Washington Street and was waiting for train "JS1 & JB1" to leave the yard, moved easterly on Track 4 Dock. This engine had attached to its easterly end what is known as a pusher car and trainman Kobal was riding on the easterly end of that pusher car. As he approached Washington Street, he observed what he thought was a body and upon further and closer inspection, this turned out to be the body of Shellhammer (P53a-15). Shellhammer's body was found at a point about two car lengths east of Washington Street (D20a-10). It was flat on its back with the feet pointed almost directly in a southerly direction and crossed one over the other (D25a-20). The head had been completely severed from the body and lay north of the south rail of Track 3 Dock (D25a-10). The shoulders were close to the south side of the south rail of Track 3 Dock (D25a-30). The arms were at shoulder level. The right hand was bare and the left hand had a glove (D26a-30). There were

no tools at or near the body (D28a-1). Word having been forwarded to Oak Island of the finding of Shellhammer's body, an inspection was made of the cars of the train immediately upon its arrival at that point. That inspection showed that there were no defects of any kind found in the train and the first mark of blood was on the second wheel from the front end of the twenty-fourth car in the train (D45a-20).

ARGUMENT

I.

The New Jersey Supreme Court did not err in affirming the action of the Courts below in entering judgment for the respondent.

The Federal Employers' Liability Act is not a Workmen's Compensation Law and in order to be entitled to a verdict, a suitor must prove that the defendant was negligent.

Wilkerson v. *McCarthy*, 336 U. S. 53, 61 (Jan. 1949).

The weight of the evidence under this Act must be more than a mere scintilla before the case may be properly left to the discretion of the trier of the fact, in this case, the jury.

Brady, Admx. v. *So. Ry. Co.*, 320 U. S. 476, 479 (December, 1943) and cases cited therein.

The measure of the defendant's duty is reasonable care having regard to the circumstances. The term "negligence" contained in this Statute had been defined by this Court to be the failure to do what a reasonable and prudent person should ordinarily have done under the circumstances.

Mo. Pac. R. R. Co. v. *Aldy*, 275 U. S. 426, 430 (1928).

In the petitioner's brief (Pb8-3) it is stated that "These facts justify the inference that after the two car inspectors had concluded the work, given the 'Okay' signal and left, that Shellhammer observed that a leak had sprung in the hose between the 23rd and 24th cars; that he thereupon put on his work gloves, shut off the air supply, replaced the defective hose with a good one, threw the defective hose on the ground where it was subsequently found and just as he turned the angle cock to turn the air on, the train started and killed him". The numerous inferences, one upon the other, that the petitioner seeks to draw, are all predicated on the fact that the witness, Kobal, testified to seeing an air hose lying on the ground two or three feet south of the decedent's feet.

Kobal testified that he saw an air hose lying along Track 2 Dock (D28a-10). It was about six or seven inches from the north rail of track 2 dock and two or three feet away from the feet of decedent as he lay on the ground (D28a-20). The distance between the south rail of track 3 dock and the north rail of track 2 dock was about 12 feet (P55a-20). The decedent was about 5'8" in height and his shoulders were close to the south rail of track 3 dock (D26a-5). While it is true that several witnesses were asked whether they had observed this hose before the decedent's body was found and they testified that they had not observed it, nevertheless, there was no proof as to how this air hose got at the point described or how long it had been there.

The proof negatived the inference that the decedent had put the air hose there after removing it from between the 23rd and 24th cars. In the first place, car inspector Helmstetter testified that after the engineer had tested the air brakes by applying and releasing them, he stood on the north side of the train just east of Washington Street, and about 15 feet from it until the train started in motion (D44a-25). If an air hose had burst, he was close enough to have heard it and he heard nothing (D45a-10). That

the supply of new air hoses was kept in a shanty near the Yardmaster's office which would be on the north side of the train (P79a-30). That the inspectors do not carry them with them while making their inspections (P80a-20). That to replace an air hose it is necessary to use a wrench (P80a-25; P81a-15). That decedent would not change an air hose personally but would have his car inspectors make the change (P81a-28).

Car Inspector Gumhold, who was the last one to see and speak with the decedent testified that after the air test had been made by the engineer and he had turned the train over to the train crew, decedent said to him "Good night. I will see you next week" (D18a-25). That decedent did not have any tools or lantern with him (D16a-25). There were no tools or lantern found near the decedent's body (D28a-1). An air hose is about 25 to 30 inches in length and 1¾ inches in diameter (P21a-35). It is permanently connected to each end of each car near the center and anyone working on it would therefore be standing between the cars and not lying on his back on the ground, as was the decedent (P40a-25).

The signs of physical injury to the body of decedent were inconsistent with the inference that he was standing between the 23rd and 24th car and was knocked down and run over. Dr. Hernandez, Deputy County Physician, who examined the body, testified that there were no injuries to the head or face, or to the shoulders, body or extremities. The only sign of injury was the complete severing of head, through the neck (D14a-1).

We respectfully submit that in view of all of the testimony introduced by the plaintiff, not only was there no justifiable inference that the decedent was killed while in the act of replacing a defective air hose but that the reasonable inferences exclude that idea.

On the question of the defendant's negligence, the plaintiff argues that the defendant's employees in the exercise of reasonable care should have anticipated that the deced-

ent might be between the cars changing an air hose and therefore should not have moved the train without going back over the forty-eight cars to make certain that the decedent was not so engaged (Pb15). This overlooks the fact that the undisputed proof in the case showed that decedent stood on Washington Street behind his car inspector, Gumhold, and of necessity heard Gumhold call to trainman O'Donnell "Jimmy, the train is all yours" (D18a-20). The plaintiff offered in evidence the Book of Rules covering the specific situation that existed (D97a, Exh. P-1). Rule 815 (D97a-35) specifically provides that foremen of car inspectors, such as the decedent, were under a duty of "protecting themselves as prescribed by Rule 26 while inspecting or repairing cars". Rule 26 known as the Blue Flag Rule specifically provided for the respective duties of car inspectors and train crews in order to prevent car inspectors from being injured by the movement of trains while they were engaged in their work. That Rule not only cast a duty upon the decedent but as a corollary, gave the train crew the right to assume that the decedent would comply with the rule. The Rule specifically provided:

> "When emergency repair work is to be done under or about cars *in a train* and a blue signal is not available, *the engineman* and fireman will be notified and protection must be given those in making a repair.
>
> "When a blue signal is placed at one or both ends of a car to *which an engine* is attached, *the engineman* and fireman *must be notified.* They must also be notified when a blue signal is removed." (Italics ours.) (D97a-15)

The proof is undisputed that at no time was Engineer Hann notified by the decedent or anyone else of any work to be done by the decedent and no blue flag was placed on his engine (D47a-10 to 40). In the absence of the decedent placing a blue flag on the engine and notifying Engineer Hann, it is not reasonable to accept the plaintiff's contention that the employees of this train should, in the

exercise of reasonable care, have anticipated that the decedent after the train had been turned over to the train crew would attempt to make any emergency repairs without complying with Rule 26, the very purpose of which was to provide protection in making of such emergency repairs.

It is asserted, in the petitioner's brief, that the respondent was liable because there was proof that the respondent violated the Safety Appliance Act and that such violation was the proximate cause of the fatality (Pb6). The specific provision of the act, which it is claimed was violated, is said to be the one prohibiting the use on its line of any locomotive engine "not equipped with a power driving wheel brake and appliances for operating the train brake system," or to run any train "that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose" (Pb8). This is the first time in any Court that such contention has been made. No reference is made to any proof in the record to substantiate this claim. There is no such proof. In fact, as we have shown in the Statement of the Case, *supra*, the undisputed proof showed that the airbrake system of the train was tested in the presence and under the supervision of the decedent and was found to be in order. After the accident when the train arrived at its destination, nine miles away it was again inspected and found to be in good order.

It is asserted in the petitioner's brief (Pb15) that the engineer of the train was "guilty of further fault in violating its own rule (Rule 30), which provides for the ringing of a bell when the engine is about to move." The proof adduced by the petitioner clearly showed that the engine bell was rung, as required by the rule, before the train started. Engineer Hann testified that before he started the train he started the engine bell ringing (D48a-1 to 20).

This Court in *Brady, Admx.* v. *Southern Railway Co.*, 320 U. S. 476 (Dec. 1943) laid down the following principles of law as being controlling in actions under the Federal Employers' Liability Act:

1. "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." (p. 479)

2. "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (p. 480)

3. "The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. * * * Bare possibility is not sufficient. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469, at 475:

" 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Events too remote to require reasonable provision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. The *Malcolm Baxter*, 277 U. S. 323, 334; Cf. *Northern Ry. Co.* v. *Page*, 274 U. S. 65, 74; *St. Louis-San Francisco Ry. Co.* v. *Mills*, *supra*.

Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury." (pp. 483-484)

In *Moore, Admx.* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (February 26, 1951) the action was under the Federal Employers' Liability Act, on behalf of the widow and children of a deceased employee. The complaint charged that while working as a brakeman, decedent was killed as the result of the negligence of the defendant within the meaning of the Act. The trial Court directed judgment in favor of the defendant railroad. This was affirmed by the Court of Appeals (184 Fed. (2d) 176) and this Court after reviewing the case, also affirmed.

The facts, as taken from the opinion of this Court, were as follows. Decedent was employed by the railroad as a brakeman in its switching yards. About 3:50 P.M. on a fair day, the crew with which decedent was working undertook its first car movement for the day. An engine and tender were headed into Track 12 and the front end of the engine was coupled onto 33 loaded freight cars which were to be moved out initially upon the straight track referred to as the ladder track. The switch at the junction of Track 12 and the ladder track was properly aligned for the train to pass onto the ladder track. Decedent gave the signal for the engine to back out of Track 12 with the cars. It moved out in a westerly direction, with the rear of the tender as the front of the moving train. Decedent was standing on a footboard at the rear of the tender, his back to the tender; the outer edge of the footboard was about ten inches in from the outer edge of the tender and about a foot above the rail. The engineer was in his seat on the same side of the train as the footboard on which decedent was standing. The engineer was turned in the seat and leaning out the side cab window, looking in the direction in which the train was moving. Decedent's duty as he rode on the footboard was to give signals to the engineer, who testified that he

could at all times see the edge of the arm and shoulder of decedent. To be thus seen and in a position to give signals, decedent had to extend outward beyond the edge of the tender, supporting himself partly by a handrail, otherwise the tender, the top of which was eight feet seven inches above the footboard, would have obstructed the engineer's view of him altogether.

The engineer testified that as the train approached switch 12 at about five miles an hour, having moved ten or twelve car lengths, he saw decedent slump as if his knees had given way, then right himself, then tumble forward in a somersault towards the outside of the track. The engineer testified that he made an emergency stop in an unsuccessful effort to avoid injuring decedent. The train ran the length of the tender and engine and about a car length and a half before it stopped at a point about an engine or car length past the switch on the ladder track. Decedent died immediately of the injuries received.

This Court in affirming the entry of a judgment in favor of the defendant railroad by the trial Court said (pp. 575 to 578):

> "To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 32. The negligence she alleged was that respondent's engineer made a sudden and unexpected stop without warning, 'thereby causing decedent to be thrown from a position of safety on the rear of the tender' into the path of the train.
>
> "It is undisputed that only one stop of the train was made and that a sudden stop without warning. The engineer was the only witness to the accident and was called to testify by pettioner. He testified that he saw decedent fall from the tender and that he made an emergency stop in an attempt to avoid injuring him. He testified that he received no signal to stop and had no reason to stop until he saw decedent fall.

When his attention was directed to the point, the engineer never wavered in his testimony that decedent was continuously in his view and in a position to give signals up to the time he was seen to fall and the emergency stop was made.

"Petitioner attempts to avoid the effect of this by pointing to statements of the engineer which allegedly contradict his testimony that decedent was continuously in his view. Petitioner relies on testimony and measurements of an expert witness, and upon the fact that the jury was permitted to view the engine and tender, to support the alleged contradiction. As a consequence, it is asserted, the jury was entitled to disbelieve the engineer's version of the accident and to accept petitioner's.

"True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt* v. *Sierra Butte Gold Mng. Co.*, 138 U. S. 483, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it.

"The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped. The only evidence which petitioner can glean from this record to support her charge is the engineer's testimony that there was no one around the switch as the train approached it, and that he did not know whether 'they' intended to take all of the 33 cars out of the switch at one time, or to stop and cut off some of them. From this it is said a jury might reasonably infer that the engineer decided to make and did make an emergency stop which threw decedent from the tender. However, the engineer's testimony, appearing at the very same page of the transcript as the statement relied on, was that he worked by signals; that he had

received no signal to stop or do anything; that in the event he did not receive a signal he would '(k) eep pulling the cars on back' until he received a signal, until he 'cleared the switch'—'(p) robably beyond.' We do not think that the isolated portion of the engineer's testimony relied on by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony totally at variance with such an inference.

"Hence, all the evidence shows is that decedent fell before the train stopped. If ones does not believe the engineer's testimony that he stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof.

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway* v. *United States*, 319 U. S. 372, 395.

"Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict. The judgment is

Affirmed."

In *Eckenrode* v. *Pennsylvania R. R. Co.*, 164 Fed. (2d) 996 (C. C. A. 3rd May, 1947), affd. 335 U. S. 329, 330 (October, 1948) the action was under the Federal Employers' Liability Act to recover damages due to the death of Eckenrode. The case was submitted to the jury which returned a verdict for the plaintiff. The trial Court set the verdict aside on the ground that there was no evidence on which the jury could find against the defendant. On the plaintiff's appeal the judgment of the trial judge was affirmed by both the Court of Appeals and this Court.

The facts as obtained from 164 Fed. (2d), page 998, disclosed the following. About noon on October 8, 1943, Eckenrode was a member of a train crew of the Pennsylvania Railroad Company. This crew was working near Cresson, Pa. An engine had pulled four loaded coal cars from a spur track onto the main track and attached them to eighteen other loaded cars standing on the main track. Eckenrode, after effecting the coupling of these cars went to the caboose where he then belonged. The engine was then to push these 22 cars up the main track, where they would be joined to others. The tracks were on an upgrade and the engine was at the rear of the 22 cars. Brakeman McGowan was at the head end of the 22 cars giving the signals for stopping and starting. The engineer and fireman were in the cab of the engine. The engineer applied the power. The train moved a little and then the wheels spun rapidly without producing the necessary traction. The engineer closed the throttle and tried again. The result was the same. This was repeated several times. Each attempt produced a slow forward movement at a speed of not more than a mile and one-half an hour.

While this was in progress, Eckenrode left the caboose, walked up past the engine cab, making joking or derisive comments to the engineer who replied in kind. Eckenrode continued to walk beyond the engine and to the side away from it. This was the last that the engineer saw Eckenrode before he was killed. The brakeman, McGowan, however, saw Eckenrode, starting to walk back diagonally up the bank toward the train. He was stooping down, evidently picking something up. In less time than it takes to tell it, somehow Eckenrode's head had been struck between the lap and head lever and the cylinder head of the engine. These levers shoot back and forth rapidly when the wheels spin. The Circuit Court of Appeals said (pp. 999-1000):

> "Out of this we cannot see a scintilla of evidence on which negligence can be found. For a man to be charged with negligence in failing to take precautions

there must be some danger toward which these precautions should be directed. Now what was the danger here? From a position of safety in the caboose, back of the engine, comes Eckenrode. He has no duties with regard to the movement of the train at this point. He walks past the cab and he and the engineer exchange talk. Then he starts off along the spur which will take him further away from the train every step. What is there to watch out for? Eckenrode knows the train crew's problem as well as any of the rest of these men. The evidence showed that he had not only been a railroad man for more than forty years, but he worked this very run and had done this very job for several years preceding the accident. We think that there was nothing in his conduct to give notice to the engineer of any possible danger involved in the situation. We see no reason why Sunderlin should have kept watch for Eckenrode, who knew as much about what had happened and what they were trying to make happen as the engineer, himself, did. But, further, even if Sunderlin had operated his throttle by touch and kept his eyes on Eckenrode all of the time, still the latter's conduct gave no indication of danger. Going down Hastings Fuel spur was certainly not conduct against which Eckenrode should have been protected, nor was his climbing up the bank so as to get nearer his train. After all, he had to rejoin that train.

"The point we are making does not involve assumption of risk. That is out of this law. Nor does it involve contributory negligence. The jury has found that Eckenrode was contributorily negligent. We are not at all sure that that finding could be sustained for it is just as speculative as is a negligence charge against the company. What we are talking goes to the very foundation of liability. It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable

and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained.

"The brakeman, McGowan, saw Eckenrode stoop and apparently pick up something. Assuming that what he picked up was sand and McGowan should have recognized it, that would still leave no basis for finding negligence. For even assuming that McGowan should have realized that Eckenrode picked up sand, there was no reason for charging him with negligence in his failing to anticipate that Eckenrode would come up close to the engine and do anything relative to the movement of the train with two handfuls of sand. We do not, in fact, know what Eckenrode was doing with the sand, assuming that he had any. Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpectable operation on Eckenrode's part.

"Any Federal Judge who sees these railroad accident cases come in and go out of the Courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case.

"The judgment of the District Court will be affirmed."

This Court, affirming the Court of Appeals for the Third Circuit, said (335 U. S. p. 330):

"There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her. Accordingly, the judgment is affirmed."

We respectfully submit therefore, that the New Jersey Supreme Court did not err in affirming the action of the Courts below in granting judgment in favor of the respondent.

II.

The petitioner cannot obtain a review in this Court of questions not raised in or decided by the New Jersey Supreme Court.

Under Point III of petitioner's brief (p. 17) it is argued that because the trial Court sustained certain objections to questions propounded to several witnesses of the petitioner, there was a denial by the trial Court of her "constitutional right to a jury trial and due process of law." The petitioner took an appeal from the judgment entered against her to the Appellate Division of the Superior Court (P9a). On that appeal she urged two grounds for reversal. The first was that the trial Court erred in entering judgment against her. The second was that the trial Court erred in various rulings relating to the exclusion of testimony and in holding that a proffered expert witness did not possess the necessary qualifications to give opinion evidence. The Appellate Division considered all of these objections and said (P149a-5):

"We have examined the record as to plaintiff's allegations of error in the trial court's exclusion of certain testimony and we find that practically all of the excluded evidence had either been testified to or was repetitious. In addition thereto, the questions concerning witnesses' conclusions as to practices of the defendant company or customs of the trade, were not shown to have been addressed to persons of qualified expert background. These latter matters are addressed to the discretion of the court and unless shown to be clearly erroneous as a matter of law, that court's action is conclusive. (Citing cases)."

Under the New Jersey practice the petitioner had the right to and in fact did file a Petition for Certification in the New Jersey Supreme Court. The reasons set forth in that petition did not seek a review of the Appellate Division's ruling above quoted. The New Jersey Supreme Court granted the certification. The petitioner did not urge or argue any of these questions before the New Jersey Supreme Court and as will be disclosed by the opinion of that Court they were not passed upon. We therefore have the situation where this Court is asked to review certain rulings on the exclusion of evidence that the petitioner did not ask the highest court of the state to pass upon.

It is well settled that this Court, in reviewing the judgment of a state court, will not pass upon any question not shown by the record, to have been raised in the state court or considered there.

Wilson v. *Cook*, 327 U. S. 474, 483 (Mar. 1946) and the cases cited therein.

CONCLUSION

It is, therefore, respectfully submitted that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JAMES J. LANGAN,
Counsel for Respondent.

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Supreme Court, U. S.
FILED
MAY 28 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1953

No. 727

KATHERINE SHELLHAMMER, General Administratrix of the Estate of Walter R. Shellhammer, deceased,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

SAMUEL M. COLE,
Attorney for Petitioner.

JACOB RASSNER,
of Counsel.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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